No. 11,974

IN THE

United States Court of Appeals

For the Ninth Circuit

WALLACE RAYMOND SHAVER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 8) of the District Court of the United States for the Northern District of California, Southern Division, convicting the defendant, after a trial by the Court, of a violation of 18 U.S.C. 409. The indictment (Tr. 2-3) was in two counts, charging in the first count, that the defendant, on or about the 30th day of October, 1947, in the City and County of San Francisco, State of California, being an employee of a carrier, to wit, Railway Express Agency, riding upon a motor truck of such carrier, transporting property in interstate commerce and having in his custody funds arising out of and accruing from such transportation, did embezzle and unlawfully convert to his

own use a portion of such funds, to wit, the sum of $73.29 which arose out of and accrued from an interstate shipment of property from Omaha, Nebraska, to and into San Francisco, California.

In the second count, a similar offense was charged in identical language, except as to the date of the offense, the amount alleged to have been embezzled and the place of shipment.

The Court below had jurisdiction under the provisions of Title 28 U.S.C., Section 41, Subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C., Section 225, Subdivisions (a) and (d).

STATEMENT OF FACTS.

There is no dispute as to the facts of this case. It is admitted that the defendant, on the dates named in the indictment, was an employee of the Railway Express Agency driving a truck in San Francisco and its environs hauling local, interstate and intrastate freight. While so employed, he did not drive the truck out of the State of California. On each of the occasions charged in the indictment the defendant delivered a package of interstate freight to the consignee, collected the amount due thereon (which consisted of taxes, express, service and C.O.D. charges) and failed to turn the amount so collected over to his employer.

STATEMENT OF POINTS RELIED ON.

Appellant relies upon the following point.

That the evidence was insufficient to support either the verdict of guilty or the judgment and sentence of the Court for the reason that, admitting all of the facts to be true, they do not constitute a violation of the statute in question.

ARGUMENT.

In 1946 Section 409 of Title 18 United States Code was redrafted.* The crime of embezzlement was added and the Section was divided into five paragraphs of which Paragraph 5 is new matter. The indictment in this case was brought under the provisions of said Paragraph 5 and, as far as we have been able to ascertain, this is a case of first impression. The indictment now before the Court is the first to be brought under said Paragraph 5 in this District.

Paragraph 5 reads as follows:

> "being an employee of any carrier riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle or unlawfully convert to his own use any such funds;"

shall be found guilty of a felony.

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*60 Stats. Pub. Law 534, Chap. 606.

It is the contention of the appellant that in order to constitute a violation of this paragraph the vehicle of the carrier upon which the defendant is riding as an employee must, at the time of the embezzlement, be moving in interstate or foreign commerce, and that it is not sufficient if, as in this case, the vehicle is a purely local one although the goods or the property being transported may be of an interstate or foreign character.

In the first place it is necessary to draw a distinction between the property being transported and the carrier transporting the same. Under the provisions of Paragraph 2 of Section 409 which covers the larceny of property from carriers engaged in interstate or foreign commerce it has been uniformly held that the property is in interstate commerce from the time it leaves the hands of the consignor until it reaches the hands of the consignee.

Boyd v. United States (C.C.A. 4), 275 Fed. 16;
Friedman v. United States (C.C.A. 1), 233 Fed. 429;
Sharp v. United States (C.C.A. 5), 280 Fed. 86.

The language of Paragraph 1, however, covers not only "goods or property moving as interstate or foreign commerce" but also "goods or property * * * which are a part of or which constitute an interstate or foreign shipment of freight or express."*

It does not follow, therefore, that because the goods or property are themselves in interstate commerce,

*18 U.S.C. 409, Par. 2.

that the carrier moving them at any particular time is moving in interstate commerce.

It is a common practice to ship small lots of goods to a carloading company at a central point for transshipment to their ultimate destination. The appellant contends, for example, that if a consignor ships goods from New York to Chicago for the purpose of having them loaded into a car with other goods for shipment to San Francisco and the goods are moved from one depot to another in Chicago, while the goods themselves are part of an interstate shipment, the carrier so moving them from one depot to another in Chicago is not moving in, or engaged in, interstate commerce.

Keeping in mind that the power of Congress to pass legislation of this type comes from the Commerce Clause of the Constitution, and that Congress is aware of its limited powers, in such matters, it is the appellant's opinion that the legislative body in enacting Paragraph 5 meant exactly what it said, i.e., that it was unlawful for any person, being an employee of a carrier, riding in or upon any railroad car, motor-truck, etc., of such carrier *transporting passengers or property in interstate or foreign commerce,* to embezzle funds in his custody arising out of or accruing from such transportation. (Emphasis supplied.) Any reasonable interpretation of this language makes it apparent that the word "transporting" governs the words "railroad car, motor truck," etc., and not the words "passengers or property." In order to accept the Government's theory of the case, it is necessary to distort the language of the section until it reads

as follows: "it is unlawful for any person, being an employee of a carrier, riding in or upon any railroad car, motortruck, etc., of such carrier, transporting passengers or property which are moving as or are a part of an interstate or foreign shipment."

It is our opinion that Congress did not so intend, and thus to make it a federal offense for a, as in this case, driver of a local truck to embezzle funds arising from goods which were part of an interstate shipment which were commingled on his truck with local and intrastate freight.

As to the intention of Congress, the Report of the House Committee on the Judiciary is persuasive. Prior to the redrafting of the Section and the addition of Paragraph 5, the Section covered four general situations:

(a) Whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or shall enter such car with intent to commit larceny therein;

(b) Whoever shall steal, etc., from any railroad car (or other specified place) goods moving as or which are a part of or which constitute an interstate shipment of freight, or shall receive the same;

(c) Whoever shall steal, etc., any baggage which shall have come into the possession of any common carrier for transportation in interstate commerce or shall steal the contents thereof or shall receive the same;

(d) Whoever shall steal or shall unlawfully take by any fraudulent device, scheme or game, from any railroad car or from any passenger thereon, when such car is a part of a train moving in interstate commerce any money, baggage, goods or chattels or shall receive the same;

An analysis of the Section as it stood prior to its redrafting indicates that in (a), (b) and (c) the test of jurisdiction is the character of the goods and not the status of the carrier; the only departure from this rule is in (d) where it is clearly stated that the test of jurisdiction shall be *"when such car is a part of a train moving in interstate commerce."*

In recasting the Section which included the addition of Paragraph 5, the Committee reported as follows:

> "The purpose of this legislation is to broaden the scope of the present Larceny Act. The existing statute applies only to larceny of interstate or foreign shipments made by rail, highway or water. *The pending bill combines the crime of embezzlement with that of larceny* and makes the entire act applicable to air transportation. The penalty remains the same as in the present law." (H.R. No. 116, Oct. 10, 1945, U. S. Code Congressional Service 1946, 2-237 Adv. Sheets No. 6; emphasis supplied.)

We respectfully submit that although Congress added the crime of embezzlement to the Section it did not intend to change the test of jurisdiction in this one instance but rather, that the test should remain

the same, that is, embezzlement of property moving as or which are a part of or which constitute an interstate shipment of freight or, under (d) infra, embezzlement from a railroad car or a passenger while on a railroad car, when such car is a part of a train moving in interstate commerce.

We respectfully submit that had Congress intended to radically change the statute in this one particular and, in effect, to confer the status of an interstate carrier upon a local truck merely because it carries, along with other property, goods which are part of an interstate shipment, the Report of the Committee would have so stated.

While it is not controlling, it is equally persuasive that the possible ambiguity present in Paragraph 5 has been clarified by the new Title 18 of the U. S. Code which became effective on September 1, 1948. In the new Code Section 409 has been redrafted into two sections, i.e., Sections 659 and 660. Section 659 covers all of the matter formerly contained in Section 409, Paragraphs 1 to 4 inclusive. Paragraph 5, with which we are concerned, is now covered by Section 660. The language in the pertinent portions of Section 660 are the same with one notable exception: the language in Section 409, Paragraph 5, "vehicle of such carrier transporting passengers or property in interstate or foreign commerce," has been changed, in Section 660, to "vehicle of such carrier moving in interstate commerce." We respectfully submit that if an ambiguity can be spelled out of the language

"transporting passengers or property in interstate or foreign commerce" as used in Section 409, it has been effectively removed from Section 660 by the use of the word "moving." Of course, inasmuch as the indictment in this case was brought under Section 409 the language in the new Code does not control. It is, however, persuasive in showing the true intent of Congress when both Acts were passed.

It is to be noted also that at the time this indictment was returned Section 412 of the U. S. Code was also in effect. This section reads in part as follows:

> "Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier who embezzles, steals, * * * any of the moneys, funds * * * of such firm * * * arising or accruing from, or used in such commerce * * * shall be deemed guilty of a felony."

By reading the two sections together we come to one inevitable conclusion. Congress intended that an *officer* of a common carrier could be guilty of the crime of embezzlement wherever funds of the carrier were embezzled, while a mere *employee* of a carrier could be guilty of embezzlement only if he embezzled funds of the carrier while riding upon a vehicle of the carrier which was itself moving in interstate commerce. Congress undoubtedly believed that an embezzlement, such as in this case, by local employee of a carrier, operating a purely local truck could be more effectively prosecuted by the States.

If Congress had wished to achieve the result contended for by the Government it would have more properly and logically amended Section 412 by adding the word employee to the list of persons who could be guilty of the crime of embezzlement of the carrier's funds, wherever the embezzlement occurred.

Finally, if we adopt the interpretation of Section 409 argued for by the Government, it is obvious that the evidence in this case is insufficient to support the verdict. According to the Government, the lower Court had jurisdiction of this offense, and the evidence was sufficient to support the judgment, not because the *vehicle* was moving in interstate commerce but because it was transporting *property* which was in interstate commerce.

A search of the record fails to disclose a scintilla of evidence that, on the dates charged in the indictment, there was any "property in interstate commerce" upon the vehicle *other than the package which, on each occasion the appellant delivered.* It was established also that, on each occasion, the package was delivered, the funds collected and allegedly embezzled. When the package was delivered it ceased to be a part of an interstate shipment. Therefore, there is a total failure of proof, essential under the Government's theory of the case, *that at the time of the alleged embezzlement or at any time thereafter* the defendant was riding upon a vehicle of a carrier, "transporting passengers or property in interstate or foreign commerce."

CONCLUSION.

For the reasons stated, we respectfully submit that the judgment and sentence appealed from should be set aside.

Dated, San Francisco, California,
December 1, 1948.

Respectfully submitted,
JAMES T. DAVIS,
Attorney for Appellant.